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IN THE

Supreme Court of the United States

October Term 1966

No. 89

ROY WALKER,

Petitioner,

v.

SOUTHERN RAILWAY COMPANY,

Respondent.

BRIEF FOR PETITIONER

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OPINIONS BELOW

The Opinion of the District Court for the Western District of North Carolina is reported in 237 F. Supp. 278, (January 16, 1965).

The Opinion of the Court of Appeals for the Fourth Circuit is reported in 354 F. 2d. 950 (1965).

JURISDICTION

The Judgment of The Court of Appeals was entered on the 22nd day of December, 1965, (R.P. 69-74).

The Petition for a Writ of Certiorari was filed on the

17th day of March, 1966, and granted on the 2nd day of May, 1966; ..... U.S. ..... 86 Sup. Ct. 1447, 16 L. ed. (2d) 530, (1966), (R.P. 76).

The Jurisdiction of This Court rests upon Title 28 U.S.C. Section 1254 (1).

STATUTES, RULES AND REGULATIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VII—CIVIL TRIALS

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U.S.C. §182. Exemption of Railway Labor Act from subchapter—The provisions of this subchapter shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

45 U.S.C. §151 (a) General Purposes—The purposes of this chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation

or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C. §153 (a) National Railroad Adjustment Board Establishment; composition; powers and duties; divisions; hearings and awards—That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

45 U.S.C. §153 (h)—The said Adjustment Board shall be composed of four divisions whose proceedings shall be independent of one another, and the said division as well as the number of their members shall be as follows:

First divisions: To Have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers and outside hostler helpers, conductors, trainmen and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

45 U.S.C. §153 (i)—The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate

division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

QUESTIONS PRESENTED

1. Did Petitioner Roy Walker have a right to bring suit against the Southern Railway Company for his wrongful discharge on May 28, 1957, when he asked for money damages only and when he had not first pursued any administrative remedy under the contract and no petition for review had been filed with the National Railroad Adjustment Board?

2. If Petitioner Roy Walker had such a right, did the District Court, on January 18, 1965, have a right to enter Judgment in his favor when he had not first pursued any administrative remedy under the contract and no petition for review had been filed with the National Railroad Adjustment Board?

3. If Petitioner Roy Walker had a right to bring the suit, and if the District Court had a right to enter Judgment for him on January 18, 1965, then, did the opinion of This Court in *Republic Steel Corporation* v. *Maddox,* 379 U.S. 650, 85 Sup. Ct. 614, 13 L. ed. (2d) 580 (1965) which was dated January 25, 1965, (eight days after the opinion of the District Court in the instant case) destroy Petitioner Roy Walker's right to sue the Southern Railway Company and the District Court's right to enter Judgment for him?

4. Should the holding in *Republic Steel Corporation* v. *Maddox* be extended to suits under the Railway Labor Act when the Labor Management Relations Act; under which *Maddox* was decided, specifically states that it does not apply to actions under the Railway Labor Act (Title 29 U.S.C.A., section 182)?

5. Should the holding in *Republic Steel Corporation* v. *Maddox* be extended to the instant case when *Maddox* was a suit for severance pay and the instant case is one for money damages by reason of wrongful discharge?

6. Do the administrative remedies under the contract and the procedure provided by the Railway Labor Act secure to a wrongfully discharged employee the same remedies he can obtain by bringing suit at law for wrongful discharge?

7. Is an employee, against whom a decision is rendered by the National Railroad Adjustment Board, deprived of his right to trial by jury and denied the equal protection of the laws when:

(a) Decisions of the National Railroad Adjustment Board which are favorable to the employee may be appealed to the courts and a trial de novo had, and when:

(b) Decisions which are favorable to the carrier may not be appealed by the employee except to show clear prejudice or a denial of procedural due process?

8. Does the opinion of This Court in *Republic Steel Corporation* v. *Maddox* require that Federal Law and not State Law be applied to all suits by railroad employees for wrongful discharge when those suits ask for money damages only?

STATEMENT

Petitioner Roy Walker was discharged by Respondent Southern Railway Company on May 28, 1957, (R.P. 68). He later brought suit in the Superior Court of Rutherford County, North Carolina, alleging wrongful discharge. Respondent Southern Railway Company filed a petition to

remove the case to the United States District Court for the Western District of North Carolina on the grounds of the amount involved and diversity of citizenship. The motion was granted and the cause removed to the District Court for the Western District of North Carolina.

Shortly thereafter, at a pre-trial conference, Petitioner voluntarily dismissed that part of his complaint in which he asked for reinstatement (R.P. 21, 22, & 39) in addition to monetary damages, thus leaving only a suit against Respondent Southern Railway Company for money damages by reason of his wrongful discharge.

The cause came on for trial without a jury before Craven, Chief Judge.

At the trial it was stipulated that Petitioner Roy Walker had not exhausted his administrative remedies or filed any petition with the National Railroad Adjustment Board before bringing suit for wrongful discharge, (R.P. 46, 47, & 48).

As the trial progressed Petitioner Roy Walker's evidence showed that he had been employed by Respondent Southern Railway Company from the early 1940's until May 28, 1957, (R.P. 2). The evidence further showed that Petitioner Roy Walker was informed by a crew clerk on March 3, 1957, that he had been "rolled for a regular job," (R.P. 21 & 40). This, in railroad parlance, meant that a man with greater seniority had taken over his job.

At the time he received this notice Petitioner Roy Walker was sick and he told the crew clerk he was sick. He later caused a call to be made to the yardmaster telling him that he was sick and could not work and obtained a doctor's certificate from Dr. T. R. Harris to the effect that he was unable to work and sent it to Mr. Edward R. Brinkley, Southern Railway Company Terminal Trainmaster, on May 11, 1957, (R.P. 3). Petitioner Roy Walker had previously

seen Mr. Brinkley about April 9, 1957, and told him that because of an operation and adhesions he was unable to work, (R.P. 4).

On April 29, 1957, a letter was sent, certified mail, by Respondent Southern Railway Company's Superintendent to Mr. Walker and was signed for by Petitioner Walker's daughter on April 30, 1957, (R.P. 5, 6, & 9). This letter advised Petitioner Walker to protect his seniority within thirty days from the date of that letter or he would forfeit it. Accordingly, Petitioner Roy Walker reported to Charlotte on the 29th day of May, 1957, about eleven o'clock a.m., in order to protect his seniority, (R.P. 8). When Petitioner Walker arrived he was shown a message pinned to the Call Book stating that he would not be allowed to work under any circumstances, that he had forfeited his seniority at midnight on May 28, 1957, (R.P. 10). This was authorized and signed by J. R. Brosnan, Division Superintendent. Petitioner Roy Walker then went to Greenville, South Carolina, to try to explain to Mr. Brosnan that he was sick but Mr. Brosnan refused to give him any consideration and informed him that he was discharged, (R.P. 68). Petitioner Walker contended that he had protected his seniority within the time alloted and Southern Railway Company contended that in order to protect his seniority he should have reported by midnight May 28, 1957.

At the trial it was stipulated by Petitioner Roy Walker that he had not exhausted his administrative remedies before commencing suit, (R.P. 46, 47, & 48). Any attempt by Roy Walker to obtain relief through the administrative channels set up under the contract would have failed because his own union wanted him discharged, (see Defendant's Exhibit #3 and #4, which are printed in the Appendix to this brief on pages 1 and 3).

On January 16, 1965, the District Court rendered a de-

cision in favor of Petitioner Roy Walker and granted him damages in the amount of $4500.00.

In reaching this decision the District Court held that Petitioner Roy Walker was not required to exhaust his administrative remedies or file a Petition with the National Railroad Adjustment Board before bringing suit because his rights in this regard were governed by the North Carolina Law and that Law did not require exhaustion of administrative remedies or petition to the National Railroad Adjustment Board before bringing suit when claimant sought only money damages.

The District Court further held that petitioner Roy Walker had protected his seniority by reporting within the thirty days and that his discharge was wrongful.

In rendering Judgment in Petitioner's favor for $4500.00, the District Court ruled that Petitioner Walker would have earned $3,000.00 per year as a fireman for the Respondent Southern Railway Company from the date of his discharge until the time of trial, a little more than seven years. Then, without allegation or proof that Petitioner Walker could have mitigated his damages by seeking and getting other employment, the Court found as a fact that he could have earned $2400.00 per year for seven years, thus reducing the recovery from $3,000.00 per year to $600.00 per year. Petitioner Walker appealed from this portion of the District Court's Judgment but the United States Court of Appeals for the Fourth Circuit, did not consider the question because it held that Petitioner Walker could not sue for any damages until he had exhausted his administrative remedies.

Respondent Southern Railway Company and Petitioner Roy Walker gave notice of appeal to the United States Court of Appeals for the Fourth Circuit, and on January 25, 1965, (eight days after the District Court had entered Judgment in the instant case), this Court decided *Republic*

Steel Corporation v. *Maddox*, 379 U.S. 650, 85 Sup. Ct. 614, 13 L. ed. (2d) 580 (1965).

This case was heard by the United States Court of Appeals for the Fourth Circuit on November 3, 1965 and on December 22, 1965, that Court rendered a decision reversing the District Court, vacating the Judgment, and ordering the case remanded to the District Court for dismissal.

The basis for the decision of the United States Court of Appeals for the Fourth Circuit was their feeling that *Republic Steel Corporation* v. *Maddox* required them to hold that a railroad employee must exhaust his administrative remedies both under the Collective Bargaining Agreement and before The National Railroad Adjustment Board prior to bringing suit for wrongful discharge.

The effect of this decision was to completely preclude suits for wrongful discharge because decisions of The National Railroad Adjustment Board are final and can only be appealed to Court for a trial de novo when The Board renders a money Judgment against a carrier.

The Court of Appeals reached this decision in spite of the fact that This Court in the *Maddox* case specifically stated that ". . . by refusing to extend *Moore* v. *Illinois Central RR Co.* to section 301 suits, we do not mean to overrule it within the field of the Railway Labor Act . . ." (*Republic Steel Corporation* v. *Maddox*, 379 U.S. 650, Page 659, 13 L. ed. (2d) 580, 85 Sup. Ct. 614, Page 619.)

ARGUMENT

At the time Roy Walker, Petitioner herein, was discharged from his employment with the Southern Railway Company, at the time this suit was commenced and at the time Judgment was entered by the District Court for the Western District of North Carolina, the law permitted Roy

Walker to either pursue his administrative remedies or ask the Courts of his country to give him a money-judgment for wrongful discharge. *Moore* v. *Illinois Central R.R. Company,* 312 U.S. 630, 61 S. Ct. 734, 85 L. Ed. 1089 (1941); *Slocum* v. *Delaware L. & W. R.R. Company,* 339 U.S. 239, 70 S. Ct. 577, 94 L. ed. 795 (1950); *Haynes* v. *Winston Salem Southbound Railway Company,* 252 N.C. 391, 113 S.E. (2d) 906, (1960).

Petitioner Roy Walker was entitled to rely on the law as enunciated by the Courts of his country and bring suit for wrongful discharge. The United States District Court for the Western District of North Carolina was entitled to rely on the law as enunciated by the Courts at the time it rendered this judgment. (Eight days before the case of *Republic Steel Corporation* v. *Maddox,* was decided.)

Therefore, even if this Court should decide to change the rule laid down in the *Moore* and *Slocum* cases, *supra,* such a change should not apply to Petitioner Roy Walker in this cause. His rights should be governed by the law as it was enunciated by this Court up to the time judgment was rendered for him in the United States District Court.

We come now to two major points. First, *Republic Steel Corporation* v. *Maddox,* 379 U.S. 650, 13 L. ed. (2d) 580, 85 Sup. Ct. 614 (1965), is not in conflict with the opinion of this Court in the *Moore* and *Slocum* cases because *Maddox* was a suit for severance pay, a specific amount of money set forth in the contract; and, by his suit *Maddox* sought a specific remedy under the contract. He actually asked The Court to require *Republic Steel Corporation* to perform the contract. The responsibility for the enforcement of any demand for performance of the contract was, under the terms of the contract itself, to be handled by administrative procedures.

In both *Moore* and *Slocum, supra,* the employee asked, not for severance pay which amounts to performance of the contract, but for damages arising from its wrongful breach. Thus a careful examination of the decisions show that there is no conflict between the doctrine announced in *Moore* and *Slocum* and the doctrine set forth in *Maddox.*

Second, your Petitioner strongly contends that the doors of the Courts of his country should not be closed to Petitioner Roy Walker when his employer breached the Contract of Employment and wrongfully discharged him. Your Petitioner earnestly urges that in suits for damages arising from breach of Contract the doctrines heretofore enunciated by this Court should stand and the doors of all Courts should be open to all citizens. Your Petitioner respectfully urges that this rule is sound for the following reasons:

1. Under most administrative procedure the employee is at the mercy of the Union and his employer. In the instant case the hostility of the Union to Petitioner Walker and the acquiesence by the Company was the determining factor. (Defendant's Exhibit #3, printed in the Appendix to this Brief on Page 1, is a copy of a letter written by L. G. Tollison, Director of Labor Relations of the Southern Railway Company, to R. L. McCollum which letter showed he had discussed the matter of Roy Walker with R. L. McCollum, General Chairman of the Brotherhood of Locomotive Firemen and Engineers, Roy Walker's Union. The last paragraph of that letter shows that the Company asked the Chairman of Roy Walker's own Union whether or not he wanted Walker rehired. The pertinent portion of the letter is set forth in the last paragraph thereof and reads as follows:

> "In the light of the circumstances related above, will you please advise promptly what your position is with

respect to this matter, i.e., whether Walker has forfeited his seniority because of his failure to report for work in conformity with the Notice served on him by the superintendent, or whether his name should be restored to the seniority roster in view of the evidence he has produced from his doctor that he was under doctor's care during the period in question."

Instead of helping Roy Walker and striving to get the Company to rehire him, the Chairman of his own Union answered the above letter and asked the Company to let his discharge stand. This is shown by a letter denominated Defendant's Exhibit #4, and printed in the Appendix to this Brief on page 3, from R. L. McCollum, Union Chairman, answering the letter of L. G. Tollison, Company Director of Labor Relations. The last paragraph of this letter is the pertinent part and reads as follows:

"Considering the circumstances in this case and the claimant's previous record, it would appear that the best action to take would be to let the matter rest as it is with Fireman Walker's name removed from the Seniority List.

Very truly yours,

(Signed) R. L. McCollum"

It is not difficult to predict what would have happened to Petitioner Roy Walker's claim for wrongful discharge had he elected to follow administrative procedures under the Contract where a hostile Union and a subservient and cooperating Company would be Judge and Jury. Nor would his chances of success have been any greater before The National Railroad Adjustment Board whose thirty-six members are equally divided between the carriers and the

Unions—each group having authority to select eighteen members. This is shown in 45 USCA Section 153 First (a) . . . "that the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 152 of this Title." Roy Walker's case would have been heard before the First Division which is composed of ten members, five of whom are selected by the carriers and five of whom are selected by the Unions. 45 USCA Section 153 (h) reads as follows:

> "The Adjustment Board shall be composed of four divisions, whose procedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows: *First Division:* to have jurisdiction over disputes involving train and yard service employees of carriers; that is, engineers, firemen, hostlers and outside helpers, conductors, trainmen and yardservice employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the National Labor Organizations of the employees."

An individual American employed by a railroad or an airline finds himself in a very precarious position. He has no voice in the establishment of the administrative procedures which he must use in case he is unjustly treated.

Steele v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192, 89 L. ed. 173, 65 Sup. Ct. 226. In this case Mr. Chief Justice Stone says on Page 200 of the U.S.:

> "§ Two, 2d. Requiring carriers to bargain with the representative so chosen operates to exclude any other

> from representing a craft. Virginian R. Company V System Federation, R.E.D. Supra (300 U.S. 545, 81 L.ed. 798, 57 Sup. Ct. 592.) The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining."

He has no voice in the selection of the members of the National Railroad Adjustment Board who will hear his complaint. The union and the company select these men. 45 U.S.C.A. §153, 1st (a) and (h):

He has no right of appeal to an impartial Court if The National Railroad Adjustment Board decides against him but the company has a right to appeal to an impartial court and have a trial de novo if the Board decides against it. *Burke* v. *Union Pacific R.R. Co.,* 129 Fed. 2d 844 (1942) Tenth Circuit. *Reynolds* v. *Denver & Rio Grande Western R.R. Co.,* 174 F. 2d 673. Justice Huxman for the Tenth Circuit, says on Page 676:

> "We conclude that the adjudication by the Board in favor of the railroad company upholding the dismissal of the appellant is final and binding and may not be challenged by the appellant in this proceeding. Coates V St. Louis and San Francisco R.R. Co. 230 Fed 2d. 798; Brotherhood of Railway & Steamship Clerks, Freighthandlers, Express & Station Employees, appellant, V. Atlantic Coastline R.R. 253 F. 2d. 753 (1958) Fourth Circuit."

The Courts, in sustaining this patently unfair procedure, have based their opinions upon the fact that a discharged employee could either sue for wrongful discharge in court or pursue his administrative remedies. This line of reason-

ing is clearly set forth in *Barnette* v. *Pennsylvania Reading Seashore Lines,* 245 F. 2d 579, where Circuit Judge Goodrich of the Third Circuit, says on Page 581:

> "Plaintiff urges, if the statute provides for a review for the carrier when the Board's decision is in favor of the employee, and not for the employee when the decision is in favor of the carrier, then the statute is unconstitutional.
>
> "We do not think either of these propositions is true. Plaintiff suggests that he was forced to take his claim to the Board but, Moore V Illinois Central R.R. Co. (1941) 312 U.S. 630, 61 Sup. Ct. 754, 84 L.ed. 1089, holds to the contrary; see also Slocum V Delaware L. & W R.R. Co. (1953), 319 U.S. 239, 70 Sup. Ct. 577, 94 L.ed. 795. The plaintiff, under authority of the Moore case, could have sued the defendant for money damages for breach of contract, if he won he would be entitled to such damages as flow from the breach.
>
> "If he chooses to press his claim before the Board because of informality of procedure or some other reason, he cannot complain of lack of mutuality since another route for the goal of recovery was open to him. A legislative policy permitting court re-examination of monetary awards but no review in cases where no award is made is not a matter for us to question unless it violates constitutional rights. The statutory scheme does not . . ."

An employee may also find that after having exhausted the administrative remedies under the contract *either* party may petition for review by The National Railroad Adjustment Board. This is clearly stated in the Act 45 U.S.C.A. §153 (i). . . .

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this matter, the disputes may be referred by petition of the parties or by either party (Italics OURS) to the appropriate division of the adjustment board with a full statement of facts and all supporting data bearing on the dispute."

Thus, the company may take him before the National Railroad Adjustment Board whether he wishes to go or not to go; and, if he loses, the decision is final and he has no right of appeal. He cannot thereafter bring suit in court. So, when Respondent insists that Petitioner was required to exhaust his administrative remedies before suit, it is actually asking this Court to hold that Petitioner has no right to sue Respondent. That his only remedy is with the company and The National Railroad Adjustment Board. Such a holding would clearly violate Petitioner's constitutional right to trial by jury which is so clearly guaranteed by the Seventh Amendment.

This Court has constantly fueled the torch which lights the way to individual freedom and liberty and opportunity. The light of that torch now shines so brightly that people in every corner of the globe lift their eyes in hope and dream of the day when all nations everywhere will touch their torches to our flame and let them burn until tyranny and bigotry and oppression are consumed by the ever growing fires of freedom.

No tribunal in the history of mankind has done so much

to protect the individual from the overpowering force of government and the unreasoning force of the mob.

Yet, as we progress in science and technology, we move toward a new society which becomes more complex, more powerful and more interdependent with each passing day. As we cross these new frontiers, solve new problems and batter at the very gates of space, new sources of force are born which selfish men, in their ever-expanding thirst for power, will seek to exploit. We must see to it that these new sources of force are not used to create or sustain an economic tyranny which will stifle the progress of free men in our enlightened Twentieth Century.

We have embraced an industrial philosophy which balances the power of organized labor against the power of giant corporations. We are constantly striving to see that this balance creates a stable and free atmosphere where individual dignity and opportunity may flourish and grow. However the struggle between these two giant forces reaches into the halls of our legislative bodies and into the courtrooms of our nation. Both sides possess tremendous financial, intellectual and political power.

Both sides seek at all costs to advance their cause.

Neither side wishes to see the outcome of the struggle placed in the hands of impartial, disinterested, tribunals. Instead, each seeks to create a special type tribunal upon which they hope to be able to impose their wishes.

When, instead of creating an impartial and disinterested tribunal, we create a tribunal equally balanced between these two opposing forces, we make it possible for these forces to cooperate in the crushing of any individual any time such action seems to them expedient.

Congress never intended The National Railroad Adjustment Board to have jurisdiction over wrongful discharge

cases. An employee who treats his discharge as final is no longer a member of the union and is no longer an employee of the carrier. Therefore, the equally balanced National Railroad Adjustment Board has no reason to worry about that employee or his fate because he is of no further use to either of the forces which control that Board.

The purposes of the Act show that this was never the intent of Congress.

45 U.S.C.A. §151 (a) "General Purposes:

> "The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

Nowhere by implication or otherwise do these purposes evidence an intent to give The National Railroad Adjustment Board exclusive jurisdiction in wrongful discharge cases because Congress surely foresaw the danger to the rights of the individual which would follow such a grant of power.

Petitioner Roy Walker respectfully shows to the Court that the years pass swiftly and litigation is lengthy (especially against larger corporation) and he asks The Court to pass on the question of mitigation of damages.

In order to show the extent of his damages, Roy Walker introduced evidence of his past earnings up to the date of his wrongful discharge in 1957.

And the earnings of the employee immediately junior to him in seniority for the years 1957 through 1963.

The trial court found it a fact that Roy Walker would have earned $3,000.00 per year as an employee of the Southern Railway Company, defendant herein, had he not been wrongfully discharged.

At this rate, from the date of his wrongful discharge in May of 1957 until the date of the trial in December of 1964 he would have earned approximately $22,500.00. This Finding of Fact by the Trial Court is supported by competent evidence of Roy Walker's earnings before his discharge.

The Trial Court then found as a fact that Roy Walker could have earned $2,400.00 per year at other employment during this period of time and that therefore he only lost $600.00 per year for seven and one half years giving judgment for Roy Walker in the amount of $4,500.00. This finding of fact is not supported by any evidence and therefore should not be upheld. Once the plaintiff has proved breach of contract and wrongful discharge and has introduced evidence from which the trial court can find the amount he would have earned had he been permitted to continue in his employment then the burden shifts to the defendant who must show matters in mitigation of damages. This burden is on the defendant and it is a burden which he must carry in order to reduce the amount of the recovery. In this case the defendant introduced no evidence as to what Roy Walker was capable of earning and therefore did not carry this burden.

North Carolina clearly holds that when an employee is

wrongfully discharged and offers evidence from which the Court finds as a fact the amount he would have earned had his employment contract not been unlawfully breached that then the burden of proof shifts to the employer and he must prove any matters in mitigation of damages. The North Carolina cases supporting this rule begin in Volume 50 of the North Carolina, *Hendrickson* v. *Anderson,* 50 North Carolina, 246; where Battle, J. says on Page 249:

> "But in a suit for the stipulated compensation the defendant may show in diminution of damages, that after the plaintiff had been dismissed he had engaged in other lucrative business. This, however, must be proved by the defendant, and must not be presumed."

To the same effect is *Smith* v. *Lumber Company,* 142 North Carolina, 26 (1906); *Construction Company* v. *Wright,* 189 N.E. 456, 127 S.E. 580 (1925).

This is also the rule on most of the jurisdiction of the United States including the Federal Court. An excellent annotation on this subject is found in 17 A.L.R. (2d) 968, the point in question being found on Page 978, and I quote:

> "By the overwhelming weight of authority in the United States the burden of proving any benefit that flows to the discharged employee is on the employer in an action for loss of wages. Another way of stating this rule is that prima facie a wrongfully discharged employee is entitled to full for the term of the contract. But, however, variously it may be expressed, the present rule, excepting one jurisdiction, is that the employer must show affirmatively, to reduce damages, that the discharged employee could or did have other earnings subsequent to the wrongful discharge."

Under this statement are cited a number of Federal cases and North Carolina is listed as being in accord.

Respectfully submitted,

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Defendant's Exhibit No. 3

August 23, 1957

LF-6-W-57

Mr. R. L. McCollum, General Chairman,
Brotherhood of Locomotive Firemen and Enginemen
First National Bank Building
Tuscumbia, Ala.

Dear Sir:

On March 3, 1957, R. E. Walker, who was working as yard fireman on 3:00 p.m. to 11:00 p.m. assignment at Air Line Junction, Charlotte, N. C., was notified that he had been displaced by another fireman through exercise of seniority. Mr. Walker did not then place himself on another assignment, mark up for any other service or request permission to be off, but simply elected to absent himself without proper leave.

When the matter was brought to the attention of Division Superintendent Brosnan, he wrote Walker at his Forest City, N. C. address on April 29, 1957, advising him that he stood for work and that unless he protected his seniority standing within thirty days from April 29, he would forfeit his seniority. Receipt of the letter was acknowledged on April 30 on the prescribed post office form, the letter having been sent by certified mail.

On May 29, at 2:45 p.m., Walker reported to the yard office at Charlotte, but was not permitted to mark up, inasmuch as he had not complied with the Superintendent's notice to report within thirty days from April 29.

On May 30, Mr. Brosnan again wrote Walker, referred to the previous letter dated April 29, and advised him that his name had been stricken from the seniority list and that he

was no longer considered an employee of the Southern Railway Company. At 4:30 p.m. that same date, Walker discussed his case with Superintendent Brosnan personally at Greenville, at which time Walker admitted he had failed to protect his seniority within the prescribed time limit. During his discussion with the Superintendent, Walker also indicated he had been off sick and in the hospital for an operation during March and that his daughter had reported this to the Company by long distance telephone call; however, the Superintendent's staff advises they have no record or knowledge of such a call having been received. Mr. Brosnan declined to change his decision in the matter.

On June 24, 1957, the Superintendent received a statement dated June 18, 1957 signed by Dr. T. R. Harris of the Gardner-Webb Community Health Center, Boiling Springs, N. C., copy of which is attached, concerning Walker's physical condition. Your attention is called to the fact that Dr. Harris gives a history which I believe you will agree anyone will interpret as meaning that Walker was unable to work during the period he was off.

In the light of the circumstances related above, will you please advise promptly what your position is with respect to this matter, i.e., whether Walker has forfeited his seniority because of his failure to report for work in conformity with notice served on him by the Superintendent, or whether his name should be restored to the seniority roster in view of the evidence he has produced from his doctor that he was under doctor's care during the period in question.

Very truly yours,

(s) L. G. TOLLESON
Director of Labor Relations

Defendant's Exhibit No. 4

September 16, 1957

Mr. L. G. Tolleson
Director of Labor Relations
Southern Railway System
Washington 13, D. C.

Dear Mr. Tolleson:

Referring further to your letter of August 23, 1957, concerning the seniority of Fireman R. E. Walker, Charlotte Division North. Your File LF-6-W-57.

This matter was discussed with you while in Washington September 11. You requested that I write you concerning my position in this matter. As I explained to you in conference, it does not matter with the Organization whether this man is returned to service or not. However, the record indicates that Fireman Walker was displaced on March 3. After being away from the service approximately 47 days, Superintendent Brosnan notified Mr. Walker that he would be required to return in 30 days or his name would be removed from the seniority list. Mr. Walker did not return within the 30 days and his name was subsequently removed from the list.

It seems Fireman Walker absented himself from service without proper leave and has forfeited his seniority. However, he did produce a doctor's statement that he was under the doctor's care during this time. Regardless of this, it did not prevent him from notifying Superintendent Brosnan at least during the 30 day period he was given to return to service. Article 26 (g) (3) of the firemen's agreement provides, "Firemen, hostlers and outside hostler helpers who voluntarily leave the service will rank as new men if re-

employed." It also seems that any claim Fireman Walker might have is barred from further handling by Article 32 (b) of the Firemen's Agreement. He did not handle his case as therein required with Superintendent Brosnan, nor did he process same to the next ranking officer.

Considering the circumstances in this case and the Claimant's previous record, it would appear that the best action to take would be to let the matter rest as it is with Fireman Walker's name removed from the list.

Very truly yours,

/s/ R. L. McCollum
R. L. McCollum

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